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No. 15157

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

CLINTON E. JENCKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From United States District Court for the Western District of Texas, El Paso Division.

PETITION FOR REHEARING.

E. B. ELFERS,
405 Caples Building,
El Paso, Texas,
JOHN T. McTERNAN,
112 West Ninth Street,
Los Angeles 15, California,
Attorneys for Appellant.

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PETITION FOR REHEARING.

To the Honorable Elbert Parr Tuttle, Ben S. Cameron and Warren L. Jones, Circuit Judges:

Appellant hereby petitions this Honorable Court for a rehearing of the within appeal, and as grounds therefor respectfully shows the following:

1. This Court Erred in Affirming the Refusal of the Trial Court to Require Production and Inspection by It of Those Reports to the F. B. I. Made by the Informers Matusow and Ford Dealing With the Subject Matter of Their Testimony.

(a) From its opinion it appears that this Court totally misconceives the nature of appellant's point and based its affirmance of the trial court upon that misconception.

(1) This Court in its opinion (p. 26) states appellant's point in this language, "Appellant argues at length

that he should have been permitted to explore the Government's file with the hope of turning up inconsistent statements by Government witnesses Ford and Matusow."

(2) Appellant's point is the trial court's denial of his motion for an order directing that the reports of the informers Matusow and Ford to the F.B.I. concerning the events and matters described in their direct testimony be produced to the court for examination and inspection, that inspection be by the court to determine whether the reports had any evidentiary value for purposes of impeachment, and that if they had that value they be made available to the defense for use in cross-examination. [R. 658-659, 897-898.]

(b) Under the decided cases it is not necessary for appellant to have shown to the trial court that these witnesses made reports to the F.B.I. which were in fact inconsistent with their direct testimony. Neither *Gordon v. United States*, 344 U. S. 414, nor any other recent case so holds. The *Gordon* case simply holds that where such inconsistency is included as part of the foundation, it is error to deny production of the report. Other cases, including *United States v. Krulewitch* (C. A. 2), 145 F. 2d 76, hold that it is not necessary to show that inconsistency before production is ordered.

(c) The case of *Shelton v. United States* (C. A. 5), 205 F. 2d 806, does not support the ruling of this Court herein, but is wholly consistent with appellant's position. In that case the trial court ordered production to it of the document requested and inspected it to determine whether it had evidentiary value. Upon finding that it

did not, the trial court refused to make it available to the defendants. That action by the trial court was affirmed by this Court. But here the trial judge refused to inspect the reports at all.

2. This Court Erroneously Affirmed the Trial Court's Improper Charge on the Credibility of Informers.

(a) Appellant has not complained that the trial court failed to adopt the precise language of the charge proffered by appellant below, and appellant's point to this Court is not one of taking "the prosecution to task for its reliance upon the testimony of such witnesses." (Opinion, p. 27.)

(b) Appellant's point to this Court is that the jury was entitled to clear and unequivocal instruction on the standards of credibility established by law for the evaluation, by men of integrity, of such irresponsible and evilly motivated people as those who inform for pay. The trial court's instruction was wholly equivocal and failed to establish any standard at all.

(c) This Court erroneously relieves the Government of all responsibility for selecting informer witnesses. (Opinion p...27.) The Government did in fact select such witnesses when it hired them to spy on their fellow citizens for pay. A citizen cannot be saddled with responsibility for having associated with people whom the Government hired to associate with him in order to inform. The suggestion in the Court's opinion that appellant "chose" to associate with Matusow when appellant fortuitously met him at a vacation resort, where the latter was operating as a hired spy for the F.B.I., ignores the facts of record. The government chose to resort to

such as Matusow to seek out citizens upon whom he could spy and inform. At the very least the government should suffer the limitations on credibility which its selection of witnesses brings on itself.

3. This Court Erred in Approving the Instructions of the Trial Court on the Issues of Membership and Affiliation.

(a) This Court found the evidence on the issue of membership sufficient to sustain the conviction only on the basis of what it called "the Government's *total proof* that appellant was so connected with the Communist Party." (Opinion, p. 13.) Appellant's principal contention on this phase of the case is that the instructions complained of did not require the jury to base its verdict on the "total proof," but upon any isolated portion thereof, whether it be the testimony of only one witness or only a single incident in the testimony of a witness. The vice of such an instruction is illustrated both by the reliance of this Court upon the "total proof" as well as by the analysis of what the jury could have based its verdict upon as indicated at pages 87-89 of appellant's main brief herein.

(b) While the court in *Hupman v. United States* (C. A. 6), 219 F. 2d 243, states in the final paragraph thereof that it approved the lower court's instructions in that case, and while the instruction concerning membership was closely similar to the one given by the trial court below, the opinion of the court in the *Hupman* case did not give the issue the detailed analysis which spells out the legal reasoning for its conclusion. In fact, but one sentence of that paragraph is devoted to an approval of the instructions. We earnestly submit that

the issues raised by the court's instructions are so serious, affecting as they do the constitutionality of the statute (29 U. S. C. A. sec. 159(h)), as well as the interpretation and application of the statute in the practical work of the National Labor Relations Board, as to require not simply a different conclusion but a careful exposition of the grounds upon which it is reached.

(c) The approval of the trial court's instructions in *Hupman v. United States, supra*, is not authority for this Court's ruling on the instructions concerning affiliation in this case. So far as we can ascertain from an examination of appellant's brief in the *Hupman* case, the trial court there did not give the same instruction concerning affiliation as was given by the trial court below. The *Hupman* opinion is therefore not authority for approval of the affiliation instruction in this case. In any event, the opinion of the Court of Appeals in the *Hupman* case devotes but one paragraph to the instructions and only one sentence to stating its approval of them. The issue posed by the instruction of the trial court below presents so important an issue that it requires not simply a different conclusion but a careful exposition of the grounds upon which it is based.

(d) For all the reasons stated in appellant's main brief (Point Seven), the trial court's instruction on the issue of affiliation was erroneous and directly in conflict with decisions of the Supreme Court cited therein, especially *Bridges v. Wixon*, 326 U. S. 135, 89 L. Ed. 2103.

(e) For all the reasons stated in appellant's main brief (Point Six) the trial court's instructions on the issue of membership were erroneous.

4. The Court Erred in Holding the Evidence in This Record Sufficient to Support the Conviction of Appellant.

(a) The Court misstated the evidence with respect to the testimony of the witness Ford when it stated (Opinion, pp. 6-7) "The security officer of the Party knew of no disciplinary action taken against appellant during 1949 or 1950 or any action to remove appellant as a member of the State Board." In fact, the witness Ford testified that in 1949 no disciplinary action against appellant was ever taken *in appellant's presence.* [R. 276, 277, 282.] In fact the witness also testified that during the period from 1949 up to September, 1950, appellant was not "*replaced* in his position on the State Board" of the Communist Party. [R. 300.] There is a vast distinction between not taking any disciplinary action against a person and not taking disciplinary action against him in his presence. There is a world of difference between not replacing someone and not removing someone from office. The difference between the evidence as it exists in the record and the evidence as stated in the Court's opinion is one which transforms testimony having no evidentiary value into testimony having some evidentiary value. Apparently this erroneous version of the evidence was considered by the Court as part of what it referred to as "the Government's total proof."

(b) The Court also misstates the evidence when it says (Opinion, p. 15) that the proof in this case is "of the same character" as that in the *Hupman* case to the effect that it was "the established policy that Communist Party members active in labor unions should not carry Communist cards, but should be entitled to a special kind of membership in the Party which afforded

the least opportunity for detection." We set out immediately below the only evidence in the entire record dealing with this subject. From this it will be seen that it is in no wise connected with appellant. Moreover, the evidence shows that it was by no means the uniform policy of the Communist Party to do as stated in the above quotation from the Court's opinion.

The first excerpt is from the testimony of the witness Ford [R. 299-300]:

> "Q. Did you carry a Communist Party card from 1949 up to September, 1950? A. No.
>
> Q. Based on your knowledge of security officer and as a member of the State Board, do you know of your own knowledge whether or not the members of the Communist Party during this period carried Party cards?
>
> * * * * * * * *
>
> A. Party members during this period usually did not carry a card.
>
> Mr. McTernan: Excuse me. That is not responsive, and I move to strike it. That is an opinion of his, and a conclusion. It is not a statement of what was done by whom.
>
> The Court: The Court said if he knew, and I assumed that he meant he did know that many of them *did carry cards*. Objection overruled." (Emphasis added.)

The second excerpt is from the testimony of the witness Eckert [R. 914-915].

> "Q. Mr. Eckert, did the Communist Party have different types of membership? A. Yes.
>
> Q. What kind of membership did you go on?
>
> * * * * * * * *

A. My membership in the Communist Party at this time, *in 1947*, was a membership at large. (Emphasis added.)

Q. What did that mean?

Mr. McTernan: Objection.

The Court: Overruled. He was an officer in the Party.

A. Membership at large was a type of membership held in the Communist Party for people occupying strategic and important positions in labor unions and other organizations where public knowledge of their membership to non-Communists would jeopardize their position in the organization."

It is perfectly apparent from an examination of the *Hupman* opinion (219 F. 2d at 247) that the evidence in that case was of an entirely different character. In the *Hupman* case there was testimony that the Party organizer for the state of Ohio told Hupman, "Since you signed this affidavit, the Taft-Hartley affidavit, read the Worker, the literature; don't pay any dues but contribute, support the Party and don't attend any closed meetings." Also the state chairman of the Party made a statement at a meeting at Hupman's home, attended by Hupman, to the effect that "five Communist members would have to sign the Taft-Hartley affidavit, and the same five should not attend any meetings after he had signed it, not pay any dues; just donate every month so much money. He should meet as an individual group which would be called the Taft-Hartley group."

From this it appears that in the *Hupman* case there were specific instructions to Hupman to conceal his membership in the Communist Party following his execution of the affidavit in question, and that Hupman

acknowledged and agreed with them. It was this evidence that the Court in the *Hupman* case referred to in the quotation set out in this Court's opinion at page 15. There is no such evidence in this case. There is nothing connecting appellant with any policy or instruction or conduct designed to conceal membership in the Communist Party before or after signing either the affidavit with which he was charged (April 28, 1950) or the affidavit concerning which there was improperly admitted proof (October 15, 1949). This record therefore provides no basis arising out of a practice of studied concealment on Jencks' part for indulging a presumption or inference of a continuation of appellant's asserted pre-affidavit connection with the Communist Party.

(c) The Court misconceived the position of appellant when it states (Opinion p. 14) that "appellant does not attempt to deny seriously that there was ample evidence from which the jury was warranted in finding that appellant was an active Communist." It is appellant's position, and it was so stated to the Court upon oral argument, that the only evidence concerning appellant's connection with the Communist Party that should be considered on this appeal was the evidence pertaining to the period prior to the signing of the affidavit dated April 28, 1950. This, because (1) the testimony of Ford concerning disciplinary action against appellant and non-replacement of him has no probative force, (2) the testimony of Terrazas that appellant urged people to read an allegedly communist newspaper is legally insufficient to connect appellant with the Communist Party as a member or affiliate under *Bridges v. Wixon*, 326 U. S. 135, 89 L. Ed. 2103. While the pre-affidavit evidence is

sufficient to show membership as of the time it speaks, it is insufficient to support the conviction because it is dated as of a period from between nine months to four years prior to the execution of the affidavit in question. Such evidence does not establish a rational basis for the operation of the presumption of continuance.

(d) The Court appears to misconceive appellant's contention when it indicates (Opinion, p. 15) that appellant's argument on the sufficiency of the evidence is that the Government's proof must speak as of the very day the affidavit was signed or filed. This is not the appellant's position. He has contended throughout that the evidence to prove that appellant knew he was a member of or affiliated with the Party on April 28, 1950, must speak as of "a period extremely close to the critical date." (Appellant's Br. pp. 82-83.) This position is based upon a number of official interpretations of the statute offered to the Congress by responsible executives of the Department of Justice, as well as upon simple logic arising out of the reasoning of the Supreme Court in the *Douds* case, that a union officer who was once a member of the Party may sign the affidavit with impunity so long as he first resigns. When the evidence does not speak as of a period extremely close to the critical date, as in the present case, it is insufficient to sustain the conviction because it cannot rationally support the inference of knowing membership as of the date in question.

(e) Appellant concedes that at various points in this brief he inexactly formulated his argument concerning

the operation of the presumption of continuance. It was not intended by appellant to state that the presumption of continuance "cannot prevail over the presumption of innocence." (Br. p. 68.) Appellant meant to say, and now says, that it is contrary to law and not rational to give effect to the presumption of continuance upon the record here for the reason that membership or affiliation in a volnutary association is a relationship too easily changed by the volition of the subject to assume that appellant, in face of the official anti-Communist policy of his government, the hysteria against Communism in the period in question, and the consequences of a false oath, would have continued this association after the oath was signed. For under these circumstances the proposition that the relation was continued is not the only probable one. It therefore cannot satisfy the requirements of the circumstantial evidence rule. If the time period between the last item of pre-affidavit proof and the date of the affidavit were so short as to bring that proof "extremely close to the critical date," the Court would have been presented with a different problem.

(f) The Court improperly holds the evidence sufficient because of appellant's failure to come forward with evidence to meet the Government's case. We have already pointed out that of the post-affidavit evidence, only Matusow's had any probative force. Of that there were independent witnesses only to the lecture and the conversation with Marcus. The lecture contained nothing to rebut for the testimony elicited only an endorsement of and urging

to read a so-called Communist newspaper. *Bridges v. Wixon, supra,* shows that to be of no value. The substance of the Marcus conversation was repeated in a subsequent private conversation, so that to call Marcus, if available, would have had little effect in rebutting Matusow. Thus only Jencks himself could rebut Matusow.

The cases are clear, including the *Bradford* case, cited in the Court's opinion, that "no presumption against the accused [arises] from his not testifying in his own behalf." (129 F. 2d at 278.)

As to appellant's failure to rebut the pre-affidavit evidence, that evidence is insufficient as a matter of law because of its remoteness to support an inference of membership or affiliation as of April 28, 1950. To require appellant to rebut it or suffer an inference against him is to deny him due process of law. For such a rule makes it possible for the Government to prove past membership and then shift to appellant the burden of disproving current membership. (See Mr. Justice Black, concurring in *Maggio v. Zietz,* 333 U. S. at 80, 81.) Further, the *Bradford* case has no application here. There the accused had been shown to have been involved in illegal transactions. He had a burden to explain his connections with them. Here *all* the pre-affidavit evidence shows appellant in a perfectly legal connection which violated neither law nor his sworn word. He had nothing to explain, for this evidence would not support the inference that he retained the connections after giving his affidavit to the contrary. (See *Dalton v. United States* (C. A. 7), 154 Fed. 461.)

5. This Court Erroneously Affirmed the Ruling of the Trial Court in Admitting Evidence Concerning the Filing of the Affidavit of October 15, 1949.

(a) This Court, upon grounds to be stated below, erroneously held that the evidence concerning the October 1949 affidavit was admissible to prove motive, intent, absence of mistake or accident, or a common scheme or plan. But if the evidence were properly received under this theory the trial court erroneously failed to instruct the jury on the permissible probative effect of the evidence. This Court ignored that portion of appellant's presentation. (See Appellant's Br. p. 50, note 8.)

(b) This Court erroneously defined as the element of "scienter" upon which the Government carried the burden, that appellant knew that it was necessary to file the affidavit in order to obtain for his union benefits and advantages under the National Labor Relations Act. The only *mens rea* which the Government was required to prove was that the affidavit was filed intentionally and that it carried a statement known by appellant to be false. (*A. C. A. v. Douds*, 339 U. S. at 413.) If there was required more than this it would stand proved from the fact of filing for everyone is "presumed to intend the natural and probable consequences" of his acts. (*Bradford v. United States, supra*, p. 277.)

(c) The Court erred in holding (Opinion, p. 22) that the October 1949 affidavit was "a competent and adequate medium for that requisite proof," referring to the proof described in the preceding paragraph. The 1949

affidavit added nothing on this score which was not provided by the 1950 affidavit. On the face of each document was a printed instruction to the effect that the affidavit must be filed "by each officer of a labor organization before that organization may receive the help of the National Labor Relations Board." [G-1, R. 979; G-7, R. 990.] Whatever the necessary proof of *mens rea*, therefore, the 1949 affidavit added nothing on that issue.

(d) The same comment applies to that portion of the Court's opinion (Opinion, p. 23) to the effect that the 1949 affidavit showed a general scheme or plan on the part of appellant to conform to the requirements of Taft-Hartley in order to obtain the benefits of that Act. The 1950 affidavit proved equally as much as the 1949 affidavit did on that score.

(e) The same comment applies to the Court's observation (Opinion, p. 24, note 12) that the filing of the 1949 affidavit showed "that appellant was familiar with the practice actually followed in such matters and the effect of the filing of the affidavit." This was proven by the 1950 affidavit, if it had to be proven, by virtue of the printed instruction already referred to.

(f) The 1949 affidavit was not admissible to meet matters elicited by the defense on cross-examination. (Opinion, p. 21.) The affidavit was identified and offered in the direct testimony of the first witness, the Labor Board clerk. The matters on cross-examination were developed much later in the case. Moreover, those matters did not go to show "that appellant must not have executed the affidavit" because of the union's policy of non-compliance. They showed, and were used to show (see our Op. Br.

p. 530), that the assertedly "Communist meetings" described by the witnesses were rather gatherings of union personnel discussing union problems. [See R. 524-530, 545-546.] Similarly, the cross-examination of Ford concerning the "closed Communist meetings" were shown to be gatherings of persons active in the Progressive Party discussing activities and policies of that organization. [R. 345, 351-352, 357-358, 365-366.]

(g) The Court in its treatment of this aspect of the case ignored appellant's point that under the cases it is impermissible to accumulate earlier occasions of filing the same statement where there was no added element of proof of knowing falsity in the earlier incidents. (See Appellant's Op. Br. pp. 31-34.)

(h) In its decision the Court ignored those portions of the record alluded to in appellant's brief wherein the prosecutor combined the proof of the 1949 affidavit together with the quotation from the union newspaper concerning the "phony affidavits" in order to charge the appellant with falsity in 1949 and to make that falsity the turning point of the case.

(i) In its opinion the Court ignored the prejudicial effect of the 1949 affidavit when combined with the quantitatively overwhelming mass of evidence dealing with appellant's purported connection with the Communist Party in the period prior to the date of that affidavit, said evidence having a greater probative value in connection with the alleged falsity of that affidavit than in connection with the alleged falsity of the 1950 affidavit.

6. This Court Erroneously Affirmed the Rulings of the Trial Court Denying Appellant a Bill of Particulars or Other Specification of the Overt Acts Upon Which the Government Intended to Rely to Establish the Falsity of the Affidavit Alleged in the Indictment.

(a) The Court misconceives the nature of appellant's requests to the trial court when it described them as asking for "particulars . . . related to the details of the evidence which the Government is seldom required to divulge." (Opinion, p. 25.) The only particulars requested by appellant were those related to the overt act or acts upon which the Government proposed to prove that defendant knew that he was a member of or affiliated with the Communist Party on April 28, 1951. [R. 15, 16, 71.]

(b) The particulars requested by appellant below were the kind of particulars upon which, under the opinion of the Supreme Court in *American Communications Assn. v. Douds*, 339 U. S. 382, 94 L. Ed. 925, the Government had to prove its case.

(c) Rather than being particulars which "the Government is seldom required to divulge," these particulars were a kind which in other criminal cases, including cases under the statute here involved, the Government is required to give. In cases where the indictment is laid only in the general statutory language and is to be proven by one or a series of acts or transactions, sound discretion requires granting the bill. (*Singer v. United States* (C. A. 3), 58 F. 2d 74, 76; *Stevens v. United States* (C. A. 6), 206 F. 2d 64; *United States v. Neff* (C. A. 3), 212 F. 2d 297; *United States v. Metropolitan etc. Assn.*, 82 Fed. Supp. 449, 455.)

(d) It was error to affirm the denial of the bill of particulars on the ground that appellant had failed in the trial court "to show any cause for the requested order." Cause existed as a matter of law. Under the *Douds* case, *supra,* the alleged falsity could have been proven only by a series of overt acts. The cases cited above stand for the proposition that where the charge and proof is of such a nature particulars are to be supplied to the defendant so as to permit him a reasonable opportunity to prepare his defense. This has been specifically applied in perjury where the issues as to falsity are substantially the same as under the statute here involved. (*United States v. Remington* (C. A. 2), 191 F. 2d 246, 249.)

(e) The failure of the appellant to attempt to meet the Government's evidence by adducing his own evidence in the trial court cannot serve as a reason for affirming the denial of the bill of particulars. In the first place, the bill of particulars was requested concerning the proof of falsity, not with reference to the filing or execution of the affidavit. The Court's reference to the appellant's failure to offer evidence on the filing issue is therefore utterly irrelevant to the determination of the question here presented. The appellant's failure to offer evidence on the overt acts related to alleged falsity, particularly in light of the times and geographic scope of the Government's proof in this regard, reasonably supports only the inference that he was so deprived of an opportunity to prepare his defense that he was unable to offer evidence to meet the Government's case in this regard.

7. **This Court Has Ignored Appellant's Point Concerning the Sufficiency of the Evidence and the Correctness of the Trial Court's Instructions Pertaining to the Issue of Whether the Alleged Affidavit Was Filed in a Matter Within the Jurisdiction of an Agency of the United States.**

8. **This Court Has Ignored Appellant's Point Pertaining to the Improper Constitution of the Grand Jury and the Trial Jury by Reason of the Systematic and Purposeful Exclusion of Women.**

Respectfully submitted,

E. B. ELFERS,

JOHN T. MCTERNAN,

Attorneys for Appellant.

Certificate of Counsel.

E. B. Elfers and John T. McTernan, attorneys for appellant, hereby certify that in their opinion the above Petition for Rehearing is well-founded and is not interposed for purposes of delay.

E. B. ELFERS,

JOHN T. MCTERNAN.

APPENDIX.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15557

CLINTON E. JENCKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the Judgment of the United States District Court for the Western District of Texas Denying Motion for New Trial.

(October 26, 1955.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

CAMERON, Circuit Judge: (1) This opinion supplements that filed in the case under No. 15,157 wherein the judgment of conviction entered January 21, 1954, was affirmed. On January 28, 1955, while the appeal from that conviction was pending, appellant filed a motion for a new trial based upon newly discovered evidence. The

motion for new trial was denied by the court below after an extended hearing, its order being entered March 12, 1955. The motion was based upon the ground that Harvey Matusow, a witness who had testified at the trial, had recanted portions of the testimony he had given and the motion was supported by an affidavit executed by Matusow in New York on January 20, 1955.

At the hearing[1] appellant relied upon the affidavit of Matusow and the oral testimony given by him as appellant's witness. The Government produced and examined ten witnesses along with a large number of exhibits. At the conclusion of the hearing the court below announced that an order would be entered denying the motion, and thereupon called Matusow before it and spoke these words to him:

> "* * * after listening attentively to your testimony and the other testimony and proceedings on this motion, I am thoroughly convinced that you are in contempt of this court in that you, alone or in conjunction with others, deliberately and maliciously and designedly schemed to obstruct justice in this court, and in furtherance thereof have caused the filing of the affidavit in this cause and thereby obtained the hearing in this court on the motion for a new trial which has just been concluded. *By recanting your former testimony, given in this court, which I believe in substance was true,* you have, in my opinion, deliberately, designedly and maliciously at-

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[1]The trial which resulted in the conviction and sentencing of appellant (No. 15,157) will be referred to as "the trial" and the hearing on the motion for a new trial (No. 15,557) will be referred to as "the hearing".

> tempted to obstruct the justice of this court * * * I am convinced from your actions, conduct and testimony had and done in my presence during this hearing, that you have deliberately and maliciously obstructed the justice of this court and contempted this court *for the purpose of furthering your personal gains.* * * *" (Emphasis supplied.)

From this statement and from the record as a whole it is manifest that the trial judge, who had sat also through the main trial, was convinced that the testimony given by Matusow at the trial was substantially true and that the testimony given on the hearing of the motion for new trial was corruptly false. The question before us is whether we should set aside those findings.

(2) Recent decisions of the Supreme Court and of this court furnish a clear blueprint of the law which shall guide us in passing upon this motion. In *United States v. Johnson*[2] the Supreme Court granted certiorari to the Court of Appeals for the Seventh Circuit, "Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances * * *."

The Court of Appeals[3] had first affirmed the District Court's action in that case in overruling a motion for new trial based on newly discovered evidence and later[4] had

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[2]1946, 327 U. S. 106.

[3]142 F. 2d 588.

[4]149 F. 2d 31.

reversed the order of the District Court overruling an amended motion based upon additional evidence that the chief prosecuting witness had committed perjury.[5] The Supreme Court felt that the case before the Court of Appeals was so lacking in merit that the appeal should have been dismissed (Pp. 111-3):

> "The crucial question before the trial court was one of fact: did the new evidence show that Goldstein's original testimony was false? The trial judge, after carefully studying all the evidence, found that there was nothing to show perjury on the part of Goldstein, that Goldstein had in fact told the truth and concluded that a new trial was not warranted. The trial court thus answered the above question in the negative. * * * But it is not the province of this court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact [citing cases]. While the appellate court might intervene when the findings of fact are *wholly unsupported by evidence* [citing cases] it

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[5]In the second hearing the Court of Appeals had reviewed at great length the affidavits offered as establishing the perjury relied upon and, based upon decisions holding that the reviewing court is in as good position as the District Court to make deductions and conclusions from affidavits, had held: "As our opinion discloses, we have reached the conclusion that Goldstein testified falsely at the trial. The conviction which we entertain in this respect is without reservation. In this situation, what is our duty as a reviewing court? Must we lay aside such conviction in deference to a contrary finding by the trial court? To do so is to acknowledge our impotency to correct what otherwise may amount to a gross miscarriage of justice. We are of the view that the fundamental right to a fair trial is not dependent upon a thread of such tenuous nature."

should never do so where it does not clearly appear that the findings are *not supported by any evidence.* * * * We think that even a casual perusal of this record should have revealed to the Circuit Court of Appeals that here nothing more was involved than an effort to upset a trial court's findings of fact." (Emphasis added.)

In *Harrison, et al. v. United States*[6] the situation presented to us was much the same as the one now before us. The recanting witnesses had been "the main prosecuting witness for the Government at appellant's trial." He swore, on the motion for new trial, that the evidence given by him was untrue and that appellants never had any interest in or connection with his activities leading to their conviction. We sustained the action of the District Court in overruling the motion based upon this recantation, using this language:

"It seems now to be settled that the order overruling the motion for new trial is a final order from which an appeal will lie. However, the court cannot substitute its judgment on the facts for that of the trial judge; it has no power to try the facts *de novo;* it can review the record for errors of law only, to determine, among other things, whether the trial judge has abused his discretion * * *.

"The trial judge, from his knowledge of the original trial, from having heard the wit-

[6]191 F. 2d 874, language quoted from 876; and see also Weiss v. United States, 5 Cir., 1941, 120 F. 2d 472, Weiss v. United States, 5 Cir., 1941, 122 F. 2d 675.

> nesses testify and observed their demeanor on the stand, was better qualified than is this court to pass on the affidavits. We do not find that the trial judge abused his discretion in overruling the motion for new trial."

(3) To apply those tests to the facts of this case is to perceive readily that there are no grounds for holding that the court below abused its discretion. The reason for sustaining the trial court's findings here are stronger than they were in either of the cases quoted from. There the court below was construing affidavits only, while here it had the advantage of observing the witness for a number of days as he proceeded to unfold the recantation. In considering the recantation, the trial judge proceeded with a fresh personal knowledge of the issues involved and of the impression made by the witnesses, including the recanter, at the trial and at the hearing, and he also had the "feel of the case" in a measure which can never be imparted by a printed transcript. His vantage point gave him a perspective which we could not hope to attain.

As the evidence on the hearing proceeded the trial court was faced with the duty which confronts all triers of fact—to separate the truth from falsehood and to reach conclusions based upon the weight of the evidence. The prompt and decisive action taken by the District Court and the language used point clearly to the fact that the truth of the matter was perfectly clear to it.

The court below had other grounds than the mere observation of Matusow, as he testified at the trial and at

the hearing, for concluding that Matusow gave testimony which was substantially true at the trial and that the recantation was pure fabrication. "Environment illuminates the meaning of acts, as context does that of words. What a man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others * * *".[7] It was proper for the court below to consider that Matusow had little demonstrable motive for lying at the trial, and the basest of all motives, personal gain, for the recantation. A brief look at that feature of the evidence will be found helpful.

(4) A few months after Matusow had testified at the trial appellant's attorney began activities which culminated in Matusow's affidavit of recantation and his testimony at the hearing. Early in August, 1954—his testimony at the trial had been given in January—the attorney prepared a motion for a new trial upon indirect information he had obtained. Consultation with associate counsel resulted in the conclusion that such an effort then would prove abortive, and a conference of appellant's lawyers was held in New York City on September 13th. Being advised that Matusow had unsuccessfully sought financial assistance in the publication of the book whose outline he had prepared, the lawyers decided to cultivate Matusow by assisting him in the publication of the book. To that end the attorney[8] procured authority from the

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[7]Mr. Justice Jackson in Cramer v. United States, 1945, 325 U. S. 1, 32.

[8]The attorney who carried out the arrangements thus agreed upon was General Counsel for Mine-Mill in addition to being Attorney of Record for Appellant. He also testified at the hearing.

officials of Mine-Mill at a meeting in Butte, Montana to spend the money reasonably necessary to accomplish the publication of Matusow's book, the initial advance being fixed at one thousand dollars. The attorney then went in company with appellant to a publisher whose interest Matusow had theretofore sought to enlist, one Kahn, and made the first advance of money to him with instructions that he track down Matusow and arrange for the writing and publication of the book. The publisher was employed to take full charge of the enterprise but was admonished not to reveal to Matusow the appellant's or the attorney's connection with it.

The publisher located Matusow through his parents and asked him, over long distance telephone, to come to New York to discuss the publication of his projected book and airplane passage was arranged. Although the publisher had never before been advised of the precise type of book contemplated by Matusow, a contract for its publication was entered into between the publisher and Matusow on the day following his arrival. The publisher arranged that Matusow should occupy an apartment in New York City and dictation of the book was begun into a tape-recording machine, the publisher asking questions and Matusow answering them. The publisher maintained contact throughout this period with the officials of Mine-Mill, sometimes approaching them directly, but most often through the attorney. The union and the attorney made advances from time to time aggregating at least $3,250.00, and there is evidence that the union, including the Canadian subsidiary, agreed to purchase a total of eleven thousand five hundred copies

of the book at a cost of nearly Six Thousand Dollars; and the union membership of about eighty thousand became actively engaged in the sale of the book, opening up a wide field of probable income to Matusow.

On October 23rd, when the publisher approached Matusow in New Mexico, the latter had been reduced economically to the low estate of doing menial jobs and calling on his erstwhile friends for small loans in order to eke out a bare existence, finally having to induce an innkeeper to trade him a few nights' lodging for his bicycle on which he was making a tour of that country. There was credible evidence that, on the night of that telephone call, Matusow flashed a roll of bills to a friend with whom he was dining, stating that he had received an advance of One Thousand Dollars from his publisher in addition to a plane ticket to New York.

During the days intervening between his arrival in New York and December 14, 1954, Matusow and the publisher had proceeded with the initial draft of his book. The publisher was in constant touch with the attorney, but Matusow did not know this. The title of the book, whose outline Matusow presented to the publisher upon his arrival, was "Blacklisting Was My Business", and the outline made no mention of appellant or of any false testimony. On December 14th, responding to a question from the publisher as reflected by the transcript of the tape-recording, Matusow dictated:

> "I knew Jencks was a Party member and I said so. I can't say here that Jencks wasn't a Party member after he signed the affidavits because I know that he was. But I

shouldn't have testified. That's the important thing. * * *"

Other statements appear in the same transcript showing that Matusow was beginning to shade his statements about Jencks to some extent, but he was not at that time sufficiently alive to what was expected of him to alter sufficiently the statements he had consistently made in order to suit the desires of those with whom he was dealing. Under these circumstances, the publisher thereupon made known to him the attorney's connection with the enterprise and took Matusow to the attorney's office. As of that moment the tape-recording sessions were abandoned. What transpired at the attorney's office on December 14th is unknown, but Matusow did admit that he received assurance from the atorney that the Government would experience great difficulty in basing any prosecution of him on any recantation he might make, and that prosecution seemed unlikely because of the adverse effect it would have on this and other pending cases.

Matusow immediately set about to construct rapidly a chapter concerning appellant's trial and delivered it to the lawyer, who, on January 9, 1955, submitted it to the Board of Directors of Mine-Mill and upon his return to New York work was begun on the recantation affidavit. Substantially one month after the happenings of December 14, therefore, Matusow produced a draft of this chapter in his book dealing with appellant's membership in the Communist Party, each page of which the attorney required that he sign. The spontaneous statement of

December 14th above quoted had been transformed to read in part as follows:

> "Jencks was not alone. Others have been indicted for the same charge. Accused of being members of the Communist Party after they had signed the Non-Communist Affidavit of the Taft-Hartley. Jencks could have been a Communist Party member, yes. I had no way of knowing it. And I didn't care. Jencks had been a Communist Party member and I presumed he had submitted his resignation as others had done prior to his signing the Non-Communist Affidavit. But, to my mind at the time, a piece of paper didn't make him any less a Communist."

Followed promptly Matusow's signature to the affidavit of recantation dated January 20, 1955, and a trip by the publisher to the executive board of Mine-Mill at which he secured approval of a cash payment of Two Thousand Dollars. The title of the book had then been changed to "False Witness". One of the sequels to the publication of the book was a report by one of the Mine-Mill officials most active in its publication to a conference of Mine-Mill Defense Fund, in which he signalled a drive to discredit all government witnesses in Communist prosecutions.

Upon the hearing Matusow gave testimony of a much stronger nature in favor of appellant than had been set forth in his affidavit or in the chapter of his book[9] deal-

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[9]Chapter 16 of *False Witness* entitled "Witness For the Persecution".

ing with this case. Further, he joined in the movement to discredit government witnesses generally by delivering a number of tirades against the Department of Justice and its attorneys, extending his vilification to members of Congress and other government officials. His boldness increased as prospects became brighter for the sale of his book.[10]

(5) The cross-examination of Matusow produced discrepancies between his oral testimony and his affidavit of recantation, and he was contradicted by witnesses introduced by the Government at the hearing, particularly with respect to the events preceding his hurried trip from New Mexico to New York in response to the publisher's telephone call. Among these were two Mormon missionaries whose testimony tended to contradict that of Matusow on vital matters, and the ticket agent at the airport, who stated that Matusow told him he was on the way back to New York to writ a book and "they are not interested in the truth but as long as they will pay money for it I will write anything."

(6) The court below also had before it testimony and statements made by Matusow before and after the trial which supported his trial testimony and discounted his recantation. On three occasions before the trial he had testified under oath to facts which squared in the main with his testimony at the trial: before the Senate Internal Security Sub-committee holding hearings at Salt Lake City October 8, 1952, before the Federal grand jury in

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[10]He made the statement, while on the stand, that he hoped to sell a million copies, it already having appeared in Poland, an Iron-Curtain country, and was being run as a serial by a French Newspaper.

El Paso, Texas on April 20, 1953, and before the Texas Industrial Commission at Austin, Texas on December 4, 1953. Subsequent to the testimony at the trial he swore, on July 12, 1954, before the House Committee on Un-American activities that he had not lied in the testimony given at the trial and on the occasions mentioned above. It is worthy of note that, in the hearing before the Senate Internal Security Sub-Committee, Matusow testified in the presence of appellant that appellant was a Communist Party member, and that his union, the International Union of Mine, Mill and Smelter Workers, was planning to cut off copper production for the Korean War by a strike. Appellant was asked by the Senate Committee if he denied the charges made by Matusow and appellant declined to answer, claiming his constitutional privilege against self-incrimination.

On October 22, 1954, Matusow told a representative of the press that he had never lied under oath, and he made a like statement to representatives of the Department of Justice in October, 1954.

(7) Under these circumstances the court below was justified in finding that Matusow testified truthfully at the trial, and that his recantation was false; in fact it is difficult to perceive how the court could have reached any other conclusion. Appellant relies heavily upon the decision of the District Court of the United States for the Southern District of New York in *United States v. Flynn, et al.*, 130 F. Supp. 412, appeal discontinued Sept. 14, 1955 on stipulation. That court rendered a lengthy opinion which we have read with care. We are not called upon